Filed 12/8/03 P. v. Ellis CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **LAMONE KENYOTA ELLIS,** **Defendant and Appellant.**	**A102015** **(Contra Costa County Super. Ct. No. 050117846)**

Lamone Kenyota Ellis (Ellis) was convicted of attempted voluntary manslaughter and making criminal threats, among other crimes. He contends the trial court erred in permitting expert witness testimony on limited aspects of battered women's syndrome, and in failing to suppress his statement to police. He also contends the conviction for making criminal threats is not supported by sufficient evidence. We disagree and affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Ellis was charged in the first count of an information with attempted murder (Pen. Code, §§ 187, 664).[1] As to this count, it was alleged he personally used a firearm (§ 12022.5, subd. (a)(1)) and intentionally discharged a firearm (§ 12022.53, subds. (b), (c)). Other charges included two counts of aggravated assault (§ 245, subd. (b)), each enhanced with an allegation of personal firearm use (§ 12022.5, subd. (a)(1)), one count

[1] Unless otherwise indicated, all further section references are to the Penal Code.

of shooting at an occupied motor vehicle (§ 246), one count of making criminal threats (§ 422) with allegations that he used a firearm (§ 12022.5, subd. (a)(1)) and was armed (§ 12022, subd. (a)(1)), one count of felon in the possession of a firearm (§ 12021, subd. (a)(1)), and one count of felon in the possession of ammunition (§ 12316, subd. (b)(1)). The information also alleged five prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), four prior serious felony convictions (§ 667, subd. (a)(1)), and probation ineligibility (§ 1203, subd. (e)(4)). Ellis pleaded not guilty and denied the enhancement allegations.

Ellis's first trial resulted in a mistrial. Evidence at the retrial included the following.

A. PROSECUTION CASE

In August 2001, Ellis lived in Richmond with Vicki Butler (Butler), her 11-year-old son David, and her daughter LeShonte. Butler's other son, 17-year-old Shomari, also stayed there at times. Butler and Ellis had been boyfriend and girlfriend for nine years.

1. Victim Butler

On August 5, 2001, Butler testified, she argued with Ellis about her daughter LeShonte and LeShonte's boyfriend. During the argument, she observed a gun in Ellis's belt buckle or pocket. He pointed the gun at her, pulled the lever back, and cocked it. Butler ran out of the house and drove off in her car, but returned to the house upon realizing Shomari was still there. By the time she returned, Ellis had left.

Butler and Ellis continued their argument when Ellis came home later that evening. Butler again drove away in her car but, realizing she had left her sons behind, returned for them. When she saw Ellis in the front yard, handling his gun, she told him not to hurt her children. Ellis pointed the gun in her direction, and she heard "pow-pows" three to four times. Moving her car forward, Butler yelled for her sons to get her purse. By the time they got to the car, she was about five or six houses away from her residence. They drove away.

Smoke was coming from the car and Butler drove to a gas station, where she noticed four holes in the driver's side of her car. She telephoned the police.

A tape recording of Butler's 911 call was played for the jury. In part, Butler told the 911 operator: "CALLER: Yes. I want to report the guy I was living with, he shot my car up and he got a gun. And you need to get him 'cause I can't take it no more. [¶] DISPATCHER: And did he threaten you, ma'am? [¶] CALLER: Yeah, he threatened me. He pulled it out on me earlier today when I -- when he came back to the house just a little while ago. My kids were there. And he done shot holes in my car. Now I'm in Oakland. [¶] DISPATCHER: Ma'am, can you -- can you tell me how long ago that occurred? [¶] CALLER: About 30 minutes -- not even 30 minutes. I came from Richmond, and I'm in Oakland right now. And he probably is gone, I don't know, but you need to get him because he's dangerous. [¶] DISPATCHER: And can I have his name. [¶] CALLER: Lamone Ellis."

At the Richmond Police Department, Butler described the events to Detective Lori Curran, consistent with her trial testimony. Butler was in shock because Ellis had never been violent toward her during their nine-year relationship, and his conduct was "out of the blue." She knew Ellis owned a gun and kept bullets in the closet, but she thought he kept the gun at work.

Before Ellis was arrested, he telephoned Butler and apologized for what had happened. She later visited him in jail, and he instructed her to: "Take the gun out of the hand [of Ellis,] and me [Butler] out of the car." In response, and because she still loved him and wanted to spare him from significant jail time, she made up a false story that the gun had fired when Shomari and Ellis were wrestling over it. She wrote a letter to Ellis blaming the incident on Shomari, and wrote letters to the trial court, prosecutor, and defense attorney claiming Ellis had not shot at her. Butler also testified to the false story—involving the gun firing when Shomari and Ellis were wrestling—at Ellis's preliminary hearing.

After the preliminary hearing, Ellis told Butler he was going to ask his former girlfriend, Audrey Bowling, to marry him. Butler then decided not to lie for Ellis any

more. She approached the district attorney, who granted her immunity from prosecution for her false testimony at the preliminary hearing, if she testified truthfully at the trial.

2. Son Shomari

Shomari confirmed in his testimony that his mother and Ellis argued on August 5, 2001, over LeShonte and her boyfriend. At one point that day, Shomari saw Ellis cock a gun and point it at Butler, and Butler fled out the door. He had feared for his mother's life.

When Ellis returned that evening, the argument continued. Butler went outside to her car. As Ellis followed, Shomari heard him say, "I am about to go back in his room and blow this . . . bitch's head off." Shomari said something to Ellis, who turned around and approached him with the gun pointed at the ground. Shomari was afraid, because Ellis had a gun.

Minutes later Butler returned in her car, and she continued to argue with Ellis outside. Ellis pulled out his handgun, pointed it at Butler's car, and fired about 10 times. Shomari was shocked. Ellis walked back into the yard and asked Shomari, "Does anybody else want some?" Although Ellis appeared angry, Shomari was "not really" scared. But hearing Butler yell for her purse, Shomari ran into the house to retrieve it and then went to her car. At some point before the shooting, Ellis had also said something like, "You want to start a war?"

At the preliminary hearing, Shomari testified he was the one who had the gun, he and Ellis "got into a little wrestle," and the gun accidentally went off. Shomari admitted at trial that this testimony was not true, and claimed Butler had asked him to lie at the preliminary hearing in order to save Ellis from a long sentence. In addition, Ellis had said he would give Shomari money for a car if he would "help him." Shomari's trial testimony, he asserted, was true.

3. Son David

David also testified that his mother argued with Ellis on August 5. When he heard the front door slam closed, he went outside and observed his mother driving off in her car. When she returned in her car minutes later, Ellis shot at it. After firing about 16

rounds, Ellis walked toward David, carrying the gun and appearing angry, and asked, "'Do anybody else want some?'" David was afraid. He ran into the house, grabbed his mother's purse, keys, and jacket, and ran out to his mother's car. As they drove away, David smelled smoke coming from the car, and his mother drove to a gas station. Earlier David had heard Ellis say he was going to blow his mother's "brains out."

At Ellis's preliminary hearing, David testified that while he was walking to the store with his mother, Shomari had come out of the house with a gun, Shomari fought over the gun with Ellis, the gun discharged accidentally as they were wrestling, and the bullet hit his mother's car across the street. At trial, David admitted his preliminary hearing testimony was false, explaining he had not wanted Ellis to be sentenced to "a lot of time." He was testifying truthfully at trial, he asserted, because he had been granted immunity from prosecution for lying at the preliminary hearing.

4. Officer Bateman

Richmond Police Officer Robert Bateman interviewed Butler, Shomari, and David separately on August 5, 2001, at about 10:45 p.m. at the Richmond Police Department. Butler described the incident similarly to the account she gave at trial, and reported no history of domestic violence. Shomari and David had also given statements similar to their trial testimony. For example, Shomari told him that Ellis, with a gun in his waistband, banged on the bedroom door stating, "'This is my house. Do you want to start a war?'" Ellis followed Butler to her car and said, "'I am going to blow her brains out.'" In the front yard, Ellis fired 12 rounds into the car, and then looked at David and Shomari and asked, "Anybody else want some?" Neither Butler, Shomari, nor David stated that Shomari fired a gun. Officer Bateman recovered a box of bullets from Ellis's closet and observed four bullet holes in Butler's car.

5. Detective Curran

Detective Curran interviewed Butler at the police department. The interview was tape-recorded, and the tape was played for the jury. Butler's account of the incident in the interview was consistent with her trial testimony. She told Curran that Ellis had taken a gun from his waistband, put the magazine into the bottom of the gun, and pointed it at

her. Later they argued again, she left in her car, returned, saw him with a gun, started to move her car forward, heard gunshots, drove away with her children, and then noticed bullet holes in the car.

Curran interviewed Ellis on August 8, 2001, and tape-recorded this interview as well. The tape was played for the jury. In the interview, Ellis initially claimed the shooting started when a "[blue] Honda or something" came by. He denied having a gun or bullets in the house. Later in the interview, however, Ellis admitted that he "shot [the gun] but it wasn't intention[al]." He "shot at the ground" and "in the air," he said, because he was angry. Ellis denied aiming the gun at Butler, and claimed he threw the gun in the bay.

6. Psychotherapist Cusick

Over defense objection, psychotherapist Marjorie Cusick testified to certain beliefs, perceptions, and behaviors of victims of domestic violence generally, including reasons a domestic violence victim might recant an accusation of abuse. (See Evid. Code, § 1107 [permitting evidence of Battered Women's Syndrome].) As we discuss in further detail *post*, Cusick explained that victims often continue in an abusive relationship, opt not to report an incident of abuse, or recant assertions of abuse, due to love, loyalty, self-blame, fear, economic factors, or other reasons. Cusick did not purport to testify to the particular incident between Ellis and Butler.

7. Other Prosecution Witnesses

Richmond Police Officer Steve Zeppa examined Butler's vehicle, noticed four bullet holes on the left side of the car, and recovered a bullet. Criminalist Richard Schorr examined the bullet holes in Butler's car and the bullet given to him by Officer Zeppa. He determined that three of the bullet holes in the car were penetrating holes and one was a ricochet/concave impression. All bullets were fired from a downward trajectory from a small pistol, and three of the holes could not have been made by someone lying on the ground.

B. DEFENSE CASE

1. Girlfriend Bowling

Audrey Bowling testified she was Ellis's girlfriend from 1990 to 1997. In August 2001, out of anger, she telephoned Butler and told her, falsely, that Ellis had impregnated her. She had remained friends with Ellis after their relationship ended, and although she had no communication with him while he was in jail, she "got word" he wanted to marry her. Bowling claimed she never saw Ellis with a gun or bullets. Bowling dislikes Butler.

2. Appellant Ellis

Ellis admitted he was convicted in 1980 and 1988 of residential burglary, and suffered a 1993 conviction for aggravated assault with a knife. He denied possessing a firearm during his relationship with Butler, claiming the gun in their residence belonged to her.

Before his relationship with Butler, Ellis had an intimate relationship with Bowling, and they remained close after breaking up. Bowling telephoned him the morning of August 5, 2001, and Butler answered. Later, he argued with Butler about LeShonte. Ellis denied pointing a gun at Butler, although he might have pointed his finger at her.

Later that evening, Ellis argued with Butler about Bowling and LeShonte, but did not say he was going to blow Butler's brains out. They yelled at each other outside and, as Butler walked toward her car, Shomari came out of the house with the .25-caliber handgun. Shomari lost his balance, Ellis grabbed for the gun, and the gun fired several times. They fell to the ground, and as they "tussle[d]" shots continued to "ring[] out." Ellis gained control of the gun, put it in his car, and later discarded it into the bay. At no time did he fire it. Nor did he ever say anything like "anybody else want some."

Ellis claimed he told Detective Curran that he had fired the gun because he was trying to protect Shomari. Although he had visits and telephone calls with Butler while he was in jail, they did not discuss how she might help his defense. When he told her after the preliminary hearing that their relationship was over, Butler, said something to the effect that she would get back at him.

C. VERDICT AND SENTENCE

The jury acquitted Ellis of attempted murder, but found him guilty of the lesser crime of attempted voluntary manslaughter (§§ 192, 664) and found true the firearm-use allegation (§ 12022.5, subd. (a)(1)). In addition, Ellis was convicted of two counts of aggravated assault and one count each of shooting at an occupied vehicle, making criminal threats, being a felon in possession of a firearm, and being a felon in possession of ammunition. The jury found the firearm-use and arming allegations to be true. In a bifurcated proceeding, the trial court found true the prior conviction allegations.

Ellis was sentenced to state prison for a term of 50 years to life. This appeal followed.

II. DISCUSSION

Ellis maintains: (1) Cusick's testimony, admitted as evidence relevant to Battered Women's Syndrome (BWS) under Evidence Code section 1107, was inadmissible; (2) his statement to Detective Curran was involuntary and inadmissible; and (3) his conviction for making criminal threats as to Shomari is not supported by sufficient evidence. We address each contention in turn.

A. CUSICK'S TESTIMONY ON REASONS A DOMESTIC VIOLENCE VICTIM MIGHT RECANT

Arguing that the trial court erred in permitting Cusick to testify as to the reasons domestic violence victims often recant, Ellis claims there was no evidence Butler was a battered woman or victim of prior domestic abuse, and the admission of her testimony violated his federal due process rights under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution.[2]

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[2] The People contend Ellis failed to preserve his federal claims because he did not make a federal constitutional argument at trial. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1264-1265.) Even if we were to recognize his right to assert federal claims, he has not established reversible error, as explained *post*.

1. Background

We begin with the context in which Cusick's testimony arose. At trial, the prosecutor asserted that Butler's credibility would be at issue and her recantation at the preliminary hearing could be explained by expert witness testimony on BWS pursuant to Evidence Code section 1107. The defense objected, arguing the evidence was irrelevant because there were no prior acts of domestic violence, and the evidence was more prejudicial than probative under Evidence Code section 352. After a hearing, the court ruled that the People's expert could explain why a victim of domestic violence might recant, but, due to the lack of evidence of any prior history of domestic abuse, precluded the expert from testifying to the "circle of violence" associated with BWS.

Before Cusick testified, the jury received the following limiting instruction, pursuant to CALJIC No. 9.35.1: "Ladies and gentlemen, you are about to receive certain evidence and information regarding a concept dealing with domestic violence. Evidence is about to be presented to you concerning domestic violence evidence. [¶] *This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged*. [¶] Domestic violence evidence research is based upon an approach that is completely different from the approach which you must take in this case. The domestic violence research begins with the assumption that physical abuse has occurred and seeks to describe and explain common reactions of women to that experience. [¶] *As distinguished from that research approach, you are to presume the defendant is innocent.* The People have the burden of proving guilt beyond a reasonable doubt. [¶] *You should consider this evidence for a certain limited purposes [sic] only. Namely, that the alleged victim's reactions as demonstrated by the evidence are not inconsistent with her having been physically abused.* Or the beliefs, perception, or behavior of the victim of certain domestic violence. To that limited extent, you may use this evidence as you would any other evidence, but you are to receive it only for that limited purpose." (Italics added.)

Cusick then testified it is common for domestic violence victims to continue in a relationship with their abuser, due to love, loyalty, self-blame, fear, or economic reasons.

Victims cope with the abuse, she added, by isolating themselves or denying or minimizing it. The prosecutor then announced, "For purposes of some of the next questions that I am going to ask you, I am going to want you to assume that there has only been one known incident of domestic violence." Cusick thereafter testified it is common for first-time abuse victims not to report the incident, due to the reasons previously mentioned (love, loyalty, etc.) or out of shock. Victims are often reluctant to testify at trial. Furthermore, in Cusick's experience, it is very common for victims to report abuse initially and later change their story and say the abuse did not occur. A victim might recant, she explained, for the reasons previously mentioned, due to certain coping mechanisms, or because of a woman's reluctance to send her children's father to jail. Cusick has observed a victim of abuse even commit perjury in order to protect her abuser. On the other hand, Cusick explained, separation from the batterer can help the victim see the incident more clearly and increase her willingness to testify truthfully against him. Cusick had not read transcripts from the case and was unaware of the type of abuse, or whether the victim recanted, in the matter at hand.

Before deliberations, the trial court again instructed the jury in accordance with CALJIC No. 9.35.1. Cusick's testimony was never mentioned in closing argument.

2. Evidence Code Section 1107

Evidence Code section 1107 reads, in relevant part: "(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. [¶] (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. . . ."

Ellis contends there was not a sufficient foundation for Cusick's testimony under Evidence Code section 1107, because there was no evidence Butler was a battered woman or victim of domestic abuse *before* the charged incident. She had testified that

Ellis was never violent toward her during their nine-year relationship, and his shooting at her came "out of the blue." Ellis denied ever hitting Butler, and Shomari had never observed Ellis acting violently toward her.

Whether evidence may be admitted pursuant to Evidence Code section 1107 based on a single charged act of domestic violence, rather than instances of domestic violence in the past, is presently before our Supreme Court in *People v. Brown* (review granted Apr. 9, 2003, S113929). California appellate courts have reached somewhat different conclusions.

In *People v. Gomez* (1999) 72 Cal.App.4th 405, the victim told police that her hands were cut when her boyfriend, the defendant, held a knife to her throat and she grabbed the knife in self-defense. (*Id.* at p. 410.) At trial, she denied telling those statements to the police and testified she merely cut herself when trying to take a knife from the defendant. (*Id*. at pp. 408-409.) Although there was no evidence of any prior domestic abuse, the prosecution was permitted to present expert testimony on BWS. In particular, the expert testified that about 80 percent of the time a woman who has been initially assaulted by a boyfriend, husband, or lover will recant, change, or minimize her story, and recanting happens most frequently after the initial incident of abuse. (*Id*. at p. 411.) The expert *also* provided a lengthy explanation of the prototypical "male batterer" and described the "cycle of violence" that arises in a long-term relationship with a batterer. (*Id*. at pp. 412-413.)

On appeal, the court in *Gomez* ruled that admission of the testimony was erroneous. The court explained: "Whether expert testimony regarding battered women's syndrome is admissible in a particular case initially depends on whether that evidence is relevant. 'In making a determination of relevancy, the court must first decide whether the evidence in the particular case supports a contention that the petitioner was a battered woman. Expert testimony on battered [women's] syndrome is irrelevant unless there is a sufficient factual basis for the fact that petitioner *was a battered woman*.'" (*Gomez*, *supra*, 72 Cal.App.4th at pp. 415-416, original italics omitted, italics added, quoting *Fennell v. Goolsby* (E.D.Pa. 1985) 630 F. Supp. 451, 459.) Because there was no

indication of prior incidents of abuse, the court concluded, the evidence did not establish that the victim was a battered woman. (*Gomez, supra,* at pp. 416-417.) Relying on the description of BWS offered by our Supreme Court, the *Gomez* court reasoned: "battered women's syndrome is a series of characteristics which appear in women who have been abused physically and psychologically *over a period of time*. [Citation.] A single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from battered women's syndrome." (*Gomez, supra,* at pp. 416-417, italics added; see *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083-1084 (*Humphrey*) [BWS "'has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives."'"].) The court concluded: "Here, other than evidence of the present incident, there is no evidence indicating that [the defendant] abused or behaved violently toward [the victim]. There is no evidence that [the defendant] fit the profile of a batterer, or that [the victim] and [the defendant] were engaged in a 'battering' relationship. On this record, [the expert's] testimony regarding battered women's syndrome was irrelevant." (*Gomez, supra,* at p. 417.)

The court in *Gomez* proceeded to find the error prejudicial, because the expert's lengthy dramatic testimony "explained in detail the several cycles of a typical battering relationship. She extensively described the male batterer, explaining how he first charms, then demeans and insults his partner. [The expert] described a battering man as someone who both psychologically and physically brutalizes a woman to satisfy his need for power and control. She compared the relationship between a battering man and a battered woman to a condition called the 'Stockholm Syndrome' which occurs when a hostage begins to view her 'attacker' as 'the good guy.' [The expert] testified a batterer is often referred to as a 'Dr. Jekyll and Mr. Hyde.'" (*Gomez*, *supra*, 72 Cal.App.4th at p. 419.) Furthermore, the court noted, both the trial court and the prosecutor had emphasized the expert's testimony. (*Ibid*.)

We point out, at this juncture, that *Gomez* is factually distinguishable from the matter at hand. In *Gomez*, the expert not only testified to the reasons a domestic violence

victim might recant, but gave a lengthy provocative description of the typical "male batterer" and the cycle of violence that arises *in a long-term abusive relationship*. It was the prejudicial nature of this latter evidence which the court emphasized as the basis for reversal. Here, by contrast, Cusick did not testify about the prototypical male batterer, the cycle of violence, or any other condition that arises with a long-term period of abuse.

Gomez was criticized in *People v. Williams* (2000) 78 Cal.App.4th 1118 (*Williams*), which involved expert witness testimony similar to the matter before us. In *Williams*, notwithstanding the lack of prior incidents of abuse, an expert was permitted to testify that it is not unusual for a domestic violence victim to lie about or conceal the abuse, out of shame and fear of isolation. (*Id*. at pp. 1123, 1126.) The expert also explained why a woman might return to a man who has battered her. (*Id*. at p. 1126.) The *Williams* court concluded: "There is nothing in . . . section 1107 to suggest that the Legislature intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator." (*Williams, supra,* at p. 1129.) The *Williams* court observed that the result in *Gomez*—precluding expert testimony on reasons a victim might recant, without prior incidents of abuse—was inconsistent with the expert testimony in *Gomez* that recanting may occur more frequently after the first incident. (*Ibid.*) The *Williams* court also distinguished *Humphrey*, *supra*, 13 Cal.4th 1073, because *Humphrey* addressed whether BWS evidence was admissible to establish self-defense to a charge of homicide: because self-defense requires a finding of the reasonableness of the defendant's belief that the killing was necessary, it is reasonable in that circumstance to require the proponent of the evidence to establish a history of abuse. (*Williams*, *supra*, at p. 1130.)

We do not see *Gomez* and *Williams* as fundamentally at odds: the different outcomes in the cases may be explained by the difference in the scope of the expert testimony they addressed. In *Gomez*, the expert testified to the "male batterer" and the "cycle of violence" in ongoing abusive relationships. In *Williams*, the expert testified

essentially to the reasons a victim of domestic violence might conceal the incident or recant. The matter before us is far more akin to *Williams*.

We conclude that the trial court did not abuse its discretion in permitting Cusick's narrowly circumscribed testimony. Cusick merely explained that victims of domestic abuse (including a first-time victim) often recant, for reasons such as being in shock over the incident or being in love with the abuser. There was obviously a factual foundation for this testimony, because after Butler accused Ellis of shooting at her—the first instance of domestic violence between them—she was shocked, she continued to have feelings for him, and she recanted. Because Cusick did not testify about the cycle of violence or other matters arising when women are battered over a period of time by the significant male in their lives, there was no reason for foundational evidence that Butler was battered over a period of time. Thus, it was neither arbitrary nor irrational for the trial court to conclude that Cusick's testimony had a tendency in reason to explain Butler's recantation. (See *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1212 [BWS testimony relevant to explain victim's recantation].)

3. Harmless Error

Even if the court erred in permitting Cusick's testimony, the error was harmless. Ultimately, the prosecution never used Cusick's testimony to explain why Butler had recanted at the preliminary hearing. Butler herself testified she recanted because she did not want Ellis to suffer a long prison sentence and she continued to be "very much in love with him." In closing argument, the district attorney did not refer to Cusick's testimony or BWS evidence, asserting merely: "There is only one reason for [Butler] and David and Shomari to have testified that way at [the preliminary hearing]. They were trying to protect the defendant because they knew he was guilty."

Ellis contends that Cusick's discussion of the reasons a domestic violence victim might recant persuaded the jury that Ellis had battered Butler in the past and must be punished regardless of his guilt or innocence of the charged offense. Not so. There was absolutely no suggestion that Ellis had battered Butler before. Cusick's testimony about a *first*-time victim of domestic violence would suggest, consistent with the undisputed

evidence, that Ellis had *not* battered her before. Even the district attorney told the jury in closing argument: "According to everybody's testimony, the defendant has never been violent towards [Butler]. In their nine, eight, whatever it is relationship, there has *never been any violence*." (Italics added.) Nor was there any implication that Butler suffered from the cycle of violence associated with long-term abuse.

Nor was Cusick's testimony, in itself, likely to persuade the jury that Ellis had committed the *charged* offense. Cusick specifically told the jury she was unaware of the facts of the case. And, as mentioned, the jury was instructed pursuant to CALJIC No. 9.35.1 that Cusick's testimony could *not* be used to find Ellis guilty of the underlying crimes, but only to explain why "the alleged victim's reactions as demonstrated by the evidence are not inconsistent with her having been physically abused."[3]

In any event, the evidence of Ellis's guilt—separate from Cusick's and even Butler's testimony—was overwhelming. Shomari and David testified that Ellis shot at Butler. Officer Curran testified that Butler accused Ellis of shooting at her, and the tape of Butler's 911 call and police interview confirmed it. According to Officer Bateman, Butler, Shomari, and David all asserted, in separate interviews within hours after the incident, that Ellis shot at Butler. Furthermore, Ellis's claim—that the gun went off accidentally *four times* as he wrestled with Shomari—defied both common sense and the physical evidence. Criminalist Schorr determined that the bullets found in Butler's car were fired from a downward trajectory, and three of the bullet holes could not have been made by someone lying on the ground. Ellis testified his hand was on top on the gun in a manner which, according to Schorr, it could not have fired. And if, in fact, the gun had fired accidentally, there would have been no reason for Ellis to leave the scene, or to represent to Detective Curran that the shots had been fired by someone in a blue Honda.

In the final analysis, it is not reasonably probable that Ellis would have obtained a more favorable result absent Cusick's testimony. (*People v. Watson* (1956) 46 Cal.2d

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[3] The jury was also instructed that it could reject an expert opinion, if the opinion assumed a fact that the jury found untrue.

818, 836.) Indeed, we can confidently say that even beyond a reasonable doubt, the verdict would not have been more favorable to Ellis without the challenged evidence. (*Chapman v. California* (1967) 386 U.S. 18.)

B. STATEMENT TO DETECTIVE CURRAN

Ellis sought suppression of his post-arrest statement to Detective Curran on the ground it was given involuntarily. He contends the trial court's denial of his motion was error.

1. Background

Detective Curran interviewed Ellis on August 8, 2001, at the police station after his arrest. Ellis waived his *Miranda* rights. He initially denied shooting the gun that night, claiming instead that someone had fired off rounds from a blue "Honda or something." Disbelieving Ellis's story, Curran falsely told him that his fingerprints were on the box of bullets found in the house. She also told him a gunshot residue test would show whether he had fired a gun up to 10 days earlier. At various points in the interview, Curran told Ellis she did not know whether charges would be filed against him. The cases she usually worked on, she said, were "far more serious" than his, and "[i]n the big picture here, it's kind of a lightweight issue, no harm, no foul, she didn't get hit." Curran also "suggested counseling" to Ellis and told him that what happened "doesn't mean you're going to prison. It doesn't even mean you're gonna get charged." If Ellis told the truth, she implied, the district attorney might decide not to charge him. In another tact, Curran implied that if Ellis told her the truth, he could continue his relationship with Butler.[4] Ellis eventually told Curran that he shot the gun at the ground when he was angry, but denied shooting intentionally or aiming at Butler.

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[4] Shortly thereafter, Curran told Ellis: "If you come in here, and I can leave this room and I can say, you know what, he told me the truth, he fucked up and, Vicki, I can say that I don't think he'll do it again then, you know what, then -- then that's on Vicki. I mean that's her decision. But she cares about you." According to Ellis's interpretation, Curran was saying that, if he told her the truth, the decision to move ahead with *the case* was up to Vicki. It appears to us that Curran was suggesting that it would be up to Vicki to decide whether to continue with their *relationship*.

2. Fifth Amendment

An involuntary statement of an accused is inadmissible for all purposes. (*Michigan v. Harvey* (1990) 494 U.S. 344, 351.) Thus, "before a confession can be used against a defendant, the prosecution has the burden of proving that it was voluntary and was not the result of any form of compulsion or promise of reward." (*People v. Jimenez* (1978) 21 Cal.3d 595, 602.) If elicited by an express or implied promise of benefit or leniency, the defendant's statement is inadmissible. (*Hutto v. Ross* (1976) 429 U.S. 28, 30; *People v. Cahill* (1994) 22 Cal.App.4th 296, 311.)

In determining whether a statement was voluntary, we look to the totality of facts and circumstances, keeping in mind the defendant's background, experience, and conduct, as well as the nature of the interrogation. (*People v. Kelly* (1990) 51 Cal.3d 931, 950; *People v. Hall* (2000) 78 Cal.App.4th 232, 239.) Relevant to this determination is whether the police employed deception during the interview. (*Fraizer v. Cupp.* (1969) 394 U.S. 731, 737, 739 (*Fraizer*); *People v. Engert* (1987) 193 Cal.App.3d 1518, 1524.) However, police trickery does not, by itself, make a confession involuntary, because "subterfuge is not necessarily coercive." (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280.) "So long as a police officer's misinterpretations or omissions are not of a kind likely to produce a false confession, confessions prompted by deception are admissible in evidence. [Citations.] Police officers are thus at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion. (See, e.g., *Frazier* [, *supra,*] 394 U.S. [], 739 [officer falsely told the suspect his accomplice had been captured and confessed]; *People v. Jones* [(1998)] 17 Cal.4th [279,] 299 [officer implied he could prove more than he actually could]; *People v. Thompson* [(1990)] 50 Cal.3d [134,] 167 [officers repeatedly lied, insisting they had evidence linking the suspect to a homicide]; *In re Walker* (1974) 10 Cal.3d 764, 777 [wounded suspect told he might die before he reached the hospital, so he should talk while he still had the chance]; *People v. Parrison* [(1982)] 137 Cal.App.3d [529,] 537 [police falsely told suspect a gun residue test produced a positive result]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125 [officer told suspect his fingerprints

had been found on the getaway car, although no prints had been obtained]; and *Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 495 [suspect falsely told he had been identified by an eyewitness].)" (*Chutan*, *supra*, at pp. 1280-1281, italics omitted.)

In reviewing the trial court's denial of Ellis's suppression motion, we defer to any factual findings the court made if supported by the record, but independently review the legal issue of the voluntariness of the confession. (*People v. Memro* (1995) 11 Cal.4th 786, 826.)

3. Application

Under the totality of facts and circumstances, Ellis's claim that his statements were involuntary is without merit. Curran began the interview by asserting that Ellis shot the gun: a justifiable accusation in light of Butler's statements. When Curran did not believe Ellis's response—that the gunshots came from some blue car that happened by—she said his fingerprints were on the box of bullets. When he denied shooting a gun recently, she represented a GSR would show whether he had fired a gun up to 10 days before. Whether these statements were true or not, there was nothing *coercive* about them. Nor did Curran promise Ellis anything, implicitly or explicitly, if he confessed guilt. Her statements that she *did not know* whether charges would be filed, he *might* be able to continue his relationship with Butler if he told the truth, and the district attorney might be persuaded not to file charges if he was remorseful and told the truth, were not so egregious or overbearing that Ellis would be persuaded to confess to something he did not do. Ellis, after all, was no stranger to the criminal justice system or, ostensibly, to police interrogation: he had been convicted twice for residential burglary and for aggravated assault on another occasion. Indeed, he had five prior strike convictions and four prior serious felony convictions.

Ellis has failed to demonstrate the trial court erred in declining to suppress his statement to Detective Curran on the ground the statement was involuntary.

C. SUBSTANTIAL EVIDENCE OF VIOLATION OF PENAL CODE SECTION 422

Count five of the information had charged Ellis with making criminal threats to Shomari and David, in violation of section 422. On separate verdict forms, the jury

found Ellis guilty of making a criminal threat to David, as set forth in count five, and guilty of making a criminal threat to Shomari, as also set forth in count five. Ellis contends his conviction under count five must be reversed as to Shomari, because there was insufficient evidence that his threat put Shomari in "sustained fear."

Under the theory asserted by the People at trial, the prosecution was required to prove, with respect to Shomari, that Ellis's threat "Does anybody else want some" caused Shomari reasonably to be in "sustained fear for his . . . own safety or for his . . . immediate family's safety." (§ 422.)[5] "[T]he term 'sustained fear' is . . . a period of time 'that extends beyond what is momentary, fleeting, or transitory.'" (*In re Ricky T*. (2001) 87 Cal.App.4th 1132, 1139-1140.)

At trial, Shomari testified he was *not* scared at Ellis's threat: "Q. And were you scared when he said, ['']Does anybody else want some['']? [¶] A. Not really. [¶] Q. You don't think you were? [¶] A. No. [¶] Q. Okay. [¶] Do you remember -- strike that. [¶] What were you thinking? What were you feeling when he said that? [¶] A. I don't know, but I don't think I was scared because I didn't move. [¶] Q. So you think you weren't scared because you didn't move? [¶] A. I didn't move."

Nevertheless, the People counter, other evidence provided a sufficient basis to conclude that Ellis's threat *did* place Shomari in sustained fear. For instance, Shomari testified he *was* afraid when Ellis approached him with a gun at some point before the threat. When he later saw Ellis shoot at his mother about 10 times, Shomari testified, he was in shock. Although Shomari assumed at trial that he was not scared by the threat Ellis subsequently made to him because he did not move, the jury could have attributed

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5 A violation of section 422 required proof that: (1) Ellis willfully threatened to commit a crime which would result in death or great bodily injury to another person; (2) Ellis made the threat with the specific intent that the statement was to be taken as a threat; (3) the threat was on its face and under the circumstances so unequivocal, unconditional, immediate, and specific to convey to Shomari a gravity of purpose and immediate prospect of execution of the threat; (4) the threat actually caused Shomari to be in sustained fear for his or her own safety or for his or her immediate family's safety; and

Shomari's lack of movement to his state of shock; and if, as Shomari testified, he was afraid earlier because Ellis merely had a gun, it would not be unreasonable to conclude that he remained afraid after Ellis had fired the gun repeatedly at his mother and angrily asked him if "anybody else want[ed] some."

We need not decide whether Ellis's threat placed Shomari in sustained fear, however. The jury found Ellis guilty on count five in making a criminal threat to *David*, as well as making a criminal threat to Shomari. Ellis does not challenge the sufficiency of the evidence with respect to the threat he made to David. Ellis therefore has failed to establish that his conviction under count five must be reversed.[6]

III. DISPOSITION

The judgment is affirmed.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.

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(5) Shomari's fear was reasonable under the circumstances. (§ 422; see *People v. Toledo* (2001) 26 Cal.4th 221, 227-228; *In re Ryan D*. (2002) 100 Cal.App.4th 854, 859-860.)

[6] The prosecutor explained in closing argument: "So then you have this issue of sustained fear. Were they scared? And there is a couple of factors that you need to think about in this. [¶] First off is there is only one charge of criminal threats. However, there is two listed victims. And my understanding is that the way that the Judge is going to let you deal with that is two verdict forms. [¶] The two listed victims are David and Shomari. Okay. The verdict forms are going to give you the opportunity with respect to David. Guilty or not guilty on criminal threats. With respect to Shomari, guilty or not guilty on criminal threats." No objection was made to the prosecutor's description.